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IN THE

Supreme Court of the United States

October Term, 1969

No. 985

STEPHEN DENNISON,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO GRANTING CERTIORARI

Statement

The State submits this brief in opposition to petitioner Stephen Dennison's writ of *certiorari* to review the decision of the Court of Appeals of the State of New York affirming the dismissal of his claim against the State of New York for false imprisonment. The Court of Appeals originally affirmed without opinion. Petitioner moved for reargument or to amend the *remittitur*. His motion for reargument was denied and his motion to amend the *remittitur* was granted by order of the Court of Appeals dated September 25, 1969. The order of the Court of Appeals amending the *remittitur* stated that

> "Claimant argued that his commitment in 1936 and his retention pursuant to the then existing Section 384 of the Correction Law constituted a violation of his rights under the equal protection clause (see *Baxstrom*

v. *Herold* [383 U. S. 107]), entitling him to damages for his retention in a criminal, rather than a civil hospital for the insane. The Court of Appeals considered this contention and held that claimant had no right to damages based on a retrospective application of *Baxstrom* v. *Herold* (*supra*). Other constitutional issues based on violation of due process raised by claimant were not determinative because the Court concluded that he sustained no actionable damages."

Questions Involved

1. Is there to be a retroactive claim against the State for false imprisonment on account of procedure by the State in respect to retention in a mental hospital under the jurisdiction of the State Department of Correction of an individual who had been transferred to such hospital from a prison before his sentence had expired, which procedure had not been held invalid at the time, where thirty years later this Court held that a change in procedure was required to be followed?

2. Does petitioner raise a substantial constitutional question under the following circumstances:

(a) There was a factual finding by the New York Appellate Division, affirmed by the New York Court of Appeals, that claimant was not damaged by reason of his detention in a mental institution under jurisdiction of the State Correction Department after the termination of his sentence because he was insane at all times during the entire period and would have been confined to a civil mental institution, and there was no proof that he would have received better treatment in another institution than he received in the mental institution.

(b) The error, if any, was by a judicial officer and under the principle of judicial immunity no cause of action lies against the State.

(c) The judicial officer was not a State officer but a county officer and the State would not be liable in any case on the theory of *respondeat superior* for his torts.

Facts

Petitioner brought a claim against the State for damages by reason of his detention at Dannemora State Hospital, a criminal hospital under the jurisdiction of the New York State Department of Correction, after expiration of his term of imprisonment on September 25, 1936 until December 16, 1960, when he was released from that institution.

Petitioner was arrested on September 9, 1925 for breaking, entering and stealing from a roadside stand. He was represented by an attorney at his trial, pleaded guilty to the charge and was placed on probation for one year. He was ordered to report to a local minister once a month during his probation period. He refused to report 5 or 6 times and was thereafter arrested and sentenced to Elmira Reformatory until discharged by law. The sentence expired September 25, 1936.

He remained at Elmira until September 15, 1927 when he was transferred to the Institution for Male Defectives at Napanoch, New York. While at Napanoch, he was paroled on December 31, 1931 to the custody of his aunt, Mrs. Leroy Stafford at Fort Edward, New York. This parole was unsuccessful, and on January 11, 1932, his aunt wrote the Superintendent of Napanoch: "Something is wrong. Stephen made threats. I do not feel safe with him in the house. I believe this should be investigated, and if insane or demented, he should be returned." Her husband told the State Investigator for Napanoch that they did not feel safe with petitioner at large. Petitioner's aunt stated

that petitioner was unmanageable, insolent and threatened suicide.

On January 26, 1932, petitioner was presented at a staff meeting for parole violation. He admitted being insolent to his aunt and his threat to commit suicide. The entry made in the Napanoch record at that time stated: "Rather talkative and somewhat paranoid". On March 2, 1932, another note in that record showed that petitioner was "possibly a potential praecox". On September 8, 1933, Dr. Harrington of Napanoch examined petitioner and reported that his mental condition was decidedly abnormal and would likely develop into a definite psychosis. The records at Napanoch continued to show that petitioner's mental condition deteriorated.

On February 29, 1936, petitioner was pronounced insane and unsuitable for further care and custody in Napanoch. Two doctors certified to this. On March 2, 1936, a psychiatric report stated that petitioner was "confused and [he] expressed a variety of absurd and delusional ideas." The diagnosis was "a definitely psychotic condition" and transfer to a State hospital was recommended. He was transferred on March 3, 1936.

In September of 1936, an application was made to the County Court by Harold Connelly, Acting Superintendent of Dannemora State Hospital for commitment of petitioner to a mental institution. His petition alleged that Dennison was insane and he prayed that he be adjudged mentally sick and committed to Dannemora. The Court appointed two qualified examiners, Dr. F. K. Ryan and Dr. E. S. McDowell, to examine him and report his condition. Their report showed that his treatment should be continued and that personal service upon him be dispensed with because it would tend to excite him.

The County Judge, by orders dated September 25, 1936, dispensed with service on Dennison because it would unnecessarily excite him and adjudged Dennison insane and ordered him to be retained at Dannemora for continued treatment. During his stay at Dannemora, the Record shows, Dennison's condition never was cured. On December 16, 1960, he was discharged by order of a County Judge in a *habeas corpus* proceeding to the custody of his brother. The discharge note made in the institution's record showed that Dennison's condition was unimproved.

He stayed with his brother for the short period of four months and was forced to leave because he could not get along with his sister-in-law, perhaps due to his making sexual overtures to her, which the records of Hudson River State Hospital noted.

In May of 1961, after an incident that occurred at the Argyle County Home, he was duly committed by court order to an institution designated by the Commissioner of Mental Hygiene for care and treatment of the mentally ill. The institution designated was the Hudson River State Hospital. He remained there until March 24, 1965 when he was placed on convalescent status (not discharged). His diagnosis at that time was schizophrenia, paranoid type.

ARGUMENT

POINT I

Baxstrom v. _Herold_ should not be applied retrospectively to a civil cause of action which arose in 1936, thirty years before the _Baxstrom_ decision by this Court.

The New York Court of Appeals held "that claimant had no right to damages based on a retrospective application of

Baxstrom v. *Herold*" (383 U. S. 107 [1966]). The Court was correct in this position. *Baxstrom* stands for the proposition that a person detained in a mental hospital under the jurisdiction of a correctional department of government after termination of his sentence because he has been certified by prison physicians to be insane is entitled to the same review and the same procedure as to the question of his sanity as persons civilly committed.

At the time petitioner was certified in 1936 by the County Court of New York State to be committed to the criminal mental hospital, no similar case had been decided either by the Courts of New York State or by the United States Courts. The principle declared in *Baxstrom* was novel even in 1966.

Law is not an exact science nor is it static. It is continually changing. Change is essential to meet the new problems of a changing world.

In recent years, the growth of law in the field of personal rights and liberties has been tremendous. Convictions are now being set aside on grounds that were undreamed of at the time the convictions were made. We have no quarrel with this concept of a growing and living law. We, however, urge that a State should not be charged with liability for its past actions upon the basis of newly established standards, standards not even heard of or dreamed of at the time the actions occurred. The Constitution guarantees against liability based upon *ex post facto* legislation. It is equally necessary to protect from liability based upon new judicial holdings or theories enunciated long after the alleged tortious act.

This Court has held that retroactivity of its own judicial decisions is something each State must decide for itself.

In *Linkletter* v. *Walker,* 381 U. S. 618 (1965), the Court considered the question of whether *Mapp* v. *Ohio,* 367 U. S. 643 (1961) should be given retrospective application in considering a State Court conviction which became final prior to its rendition. This Court refused to so hold, saying (637):

> "We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved. Nor would it add harmony to the delicate state-federal relationship of which we have spoken as part and parcel of the purpose of *Mapp.* Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." (Emphasis supplied.)

In *Johnson* v. *New Jersey,* 384 U. S. 719 (1966), this Court discussed cases in which new determinations should be applied prospectively and retroactively. As to cases in which they should be applied prospectively, it said (pp. 726-727):

> "In the past year we have twice dealt with the problem of retroactivity in connection with other constitutional rules of criminal procedure. *Linkletter* v. *Walker,* 381 U. S. 618; *Tehan* v. *Shott,* 382 U. S. 406. These cases establish the principle that in criminal litigation concerning constitutional claims, 'the Court may in the interest of justice make the rule prospective where the exigencies of the situation require such an application.' 381 U. S. at 628. These cases also delineate criteria by which such an issue may be resolved. We must look to the purpose of our new standards governing police interrogation, the reliance which may have been placed upon prior decisions on the subject, and the effect on the administration of justice of a retroactive application of *Escobedo* and *Miranda.* See 381 U. S. at 636; 382 U. S. at 413.

> "In *Linkletter* we declined to apply retroactively the rule laid down in *Mapp* v. *Ohio,* 367 U. S. 643, by which evidence obtained through an unreasonable search and seizure was excluded from state criminal proceedings. In so holding, we relied in part on the fact that the rule affected evidence 'the reliability and relevancy of which is not questioned.' 381 U. S. at 639. Likewise in *Tehan* we declined to give retroactive effect to *Griffin* v. *California,* 380 U. S. 609, which forbade prosecutors and judges to comment adversely on the failure of a defendant to testify in a state criminal trial. In reaching this result, we noted that the basic purpose of the rule was to discourage courts from penalizing use of the privilege against self-incrimination. 382 U. S. at 414."

The choice between retroactivity and nonretroactivity does not turn on the constitutional guarantee involved. Declining to give a rule retroactivity is no disparagement of the constitutional guarantee considered therein.

In *Great Northern Ry. Co.* v. *Sunburst Oil and Refining Co.,* 287 U. S. 358 (1932), this Court said (364):

> "This is a case where a court has refused to make its ruling retroactive, and the novel stand is taken that the constitution of the United States is infringed by the refusal.
>
> "We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions."

The problem was considered by the New York State Court of Appeals in *People* v. *McQueen,* 18 N. Y. 2d 337 (1966), where Judge Van Voorhis wrote (pp. 342-43):

> "The expansion of post conviction remedies, however, by such Federal and State decisions as *Jackson* v.

Denno (378 U. S. 368), *Fay* v. *Noia* (372 U. S. 391), *Townsend* v. *Sain* (372 U. S. 293), *Sanders* v. *United States* (373 U. S. 1), *Brown* v. *Allen* (344 U. S. 443) and *People* v. *Huntley* (15 N. Y. 2d 72) would render a large and increasing number of criminal convictions subject to being vacated even though the defendants had been tried and convicted in accordance with the law as it was understood and applied at the time. The past can seldom be reformed in the image of the present, and it is manifest that not every type of conviction can be set aside where the wisdom of the present does not coincide with that of the past.

* * *

"Quite evidently the Supreme Court was considering its function in establishing the law of the land in regard to such situations, and any seeming inequalities which may thereby have resulted to these particular individuals were considered to be of secondary importance."

Judge KEATING added (p. 349):

"But if every changing advance in the law means that we must wash away the past and undo all that has already been done, I am afraid that this progress which is so desirable will be seriously hampered, often with no correlative gain to be shown for the effort."

and (p. 351):

"If it is unjust to deprive the appellant, McQueen, of *Miranda's* benefits, it is at least equally unjust to deny them to those whose cases have already completed the appellate process. Yet no one has urged that we give the rule *complete* retroactivity. Any line drawn is essentially arbitrary."

In *People* v. *Howard*, 12 N. Y. 2d 65, 66 (1962), the New York State Court of Appeals said:

"As an abstract matter, there are few who would dispute the proposition that it is highly desirable that the law provide corrective process at any time for any

> substantial defect. There is, on the other hand, an unmistakable social value in putting an end to litigation at some point and there is, as well, an unmistakable social burden in affording corrective process for any defect."

The concept of not granting retroactivity to all new decisions is an ancient one.

In *Lyon* v. *Richmond*, 2 J. Ch. 51 (1817), Chancellor Kent wrote 150 years ago (p. 60):

> "And to permit a subsequent judicial decision in any one given case, on a point of law, to open or annul everything that has been done in other cases of the like kind, for years, before, under a different understanding of the law, would lead to the most mischievous consequences. Fortunately for the peace and happiness of society, there is no such pernicious precedent to be found."

These decisions dramatically demonstrate that while, of course, an ever-changing society requires a changing concept of what constitutes due process, and those affected by the old concept not unnaturally protest that the new concept should always have existed and therefore reparations by way of money are due them because they did not receive the benefit of the new concept, it is not in every case that reparation is possible. In fact, to accord it in many cases would burden the corrective processes rather than improve them.

POINT II

No substantial constitutional right of petitioner was violated because petitioner suffered no actionable damages.

There is no substantial constitutional question involved here. The New York Court of Appeals in its order amend-

ing the *remittitur* said that it concluded that petitioner sustained no actionable damage. The New York Appellate Division in its opinion stated:

> "But in any event there is no evidence of any substance that at that time or at any time thereafter claimant's condition would have been cured or substantially improved by his transfer to a civil hospital or by his discharge and we are constrained to find conjectural merely the proof upon which the award rests. It is to be noted that under section 385 of the Correction Law, as it read in 1936, the Commissioner of Mental Hygiene could have directed claimant's transfer to a civil hospital. Such discretionary procedure, however, had nothing whatsoever to do with the section 384 proceedings. In conclusion, we would emphasize claimant's theory of damage and the question of medical judgment which seems to us its necessary predicate.
>
> * * *
>
> "In view of the undoubted discretionary right that the appropriate State authorities possessed to discharge, parole or transfer claimant, should either course have been advisable, the most that can be predicated on their omission to act is a contention that the State's physicians were guilty of errors of professional judgment, if claimant's medical proof be credited. Errors of that nature do not, however, cast liability upon the State. (*St. George* v. *State of New York*, 283 App. Div. 245, affd. 308 N. Y. 681; *Taig* v. *State of New York*, 19 A. D. 2d 182.)"

The factual finding made by the Appellate Division was that petitioner suffered no damage by reason of his being retained in Dannemora. If he suffered no damage by reason of his detention in Dannemora, there is no substantial Federal question involved.

Moreover, Dennison was committed to Dannemora after the termination of his sentence by order of County Judge

THOMAS CROAKE, dated September 25, 1936. If his constitutional rights were violated, they were violated as the result of that Court proceeding and for that the State of New York is not liable. The State has consented to be sued in tort only to the same extent as private individuals or corporations. New York Court of Claims Act, Section 8. Section 8 was considered by the New York Court of Appeals in *Weiss* v. *Fote*, 7 N. Y. 2d 579 (1960) where it said (pp. 586-587):

> "The plaintiffs contend that the Court of Claims Act destroyed any and all facets of governmental immunity and that numerous decisions of this court have so held. Such a reading of the statute and our cases is mistaken. In providing that 'The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations' (Court of Claims Act, § 8), the Legislature intended to put an end to the immunity of the State which derived from its status as a sovereign. In other words, it was the legislative design that, *in respect of its legal status*, the State be treated like any individual or corporation. This is far different from saying, however, that the Court of Claims Act places the State on a parity with private corporations or individuals *in respect of all of its defenses*. Neither the language of the statute nor its tenor supports such a view" (Italics by the Court).

Since individuals and corporations do not engage in governmental activity, the waiver granted does not extend to activities which are purely governmental (*Newiadony* v. *State*, 276 New York App. Div. 59 [3rd Dept., 1949]).

The rule that sovereign immunity has not been waived for purely governmental functions, especially applies to the Judiciary. There is no function of a State more governmental than the Judiciary. This is one realm that private enterprises cannot hope to penetrate.

In *Koeppe* v. *City of Hudson*, 276 New York App. Div. 443 (3rd Dept., 1950), the Court clearly stated the law with respect to liability for acts of a Judge, saying (p. 446):

> "But the question remains whether a city is liable for a lawless act committed by a city judge. In all the host of cases where false arrest and imprisonment have been charged we have discovered none where liability has been found against the State or a civil division thereof for the judicial abuse of criminal process. Invariably the liability has been personal when found. Of course this may be due to the fact that under the old doctrine of sovereign immunity, which existed until a comparatively recent date, an action was not allowed against a city for the acts of a city judge or magistrate (*Giordano* v. *City of Asbury Park*, 91 F. 2d 455). But we are inclined to the view that there are other weighty reasons to support the doctrine of immunity for a municipality which still exist.
>
> "A judicial officer is not an employee in the sense that the doctrine of *respondeat superior* can be logically applied to his acts. Whether he belongs to a court of general or inferior jurisdiction he acts independently of any restraint or dictation except that found in the law. He is not subject to orders like a policeman, and he may not be discharged by the local authorities of the civil division where he may serve on an inferior court. In fact he is a part of an independent branch of government, and the exercise of his judgment as to any matter before him is untrammeled and unfettered. It would be incongruous therefore to fasten liability upon a municipality for the tort of a local judicial officer who acts wholly independent of and beyond the control of municipal authorities."

The Federal rule is no different than the State rule. See *Puett* v. *City of Detroit, etc.*, 323 F. 2d 591 (6th Cir., 1963), cert. den. 376 U. S. 957, where the Court held that there was no cause of action either against a municipal

judge and other public officers or the city resulting from a judicial decision, saying:

> "It seems clear that under the principle of judicial immunity no cause of action lies against the Municipal Judges, the Assistant Prosecuting Attorney, and the Corporation Counsel of the City of Detroit. * * *
>
> "Likewise, it is settled that no cause of action under the statutes relied upon by plaintiff lies against the City of Detroit."

Thus, no cause of action arose against the State of New York by reason of the Court's action in holding Dennison after the termination of sentence.

Moreover, the retention was by a County Judge. Judge CROAK, a County Judge, is not an officer of the State. If there were a liability for his judicial actions on the theory of master and servant, the State would not be liable for these errors, but they would be the responsibility of the county. The County Judge is not a State officer; he is a local officer who is elected by voters of a part of the State.

In *Corcoran* v. *State* (30 New York A. D. 2d 991 [3rd Dept., Oct. 17, 1968], aff'd 24 N. Y. 2d 922), the Appellate Division said:

> "The claimant further contends that his request to appear before the Grand Jury was improperly denied by the District Attorney, and that his plea of guilty was coerced by the County Judge and his attorney and by reason thereof, he is entitled to damages from the State. In view of the fact that these complaints are made against the acts of a District Attorney and a County Judge, neither of whom are State officers within the meaning of the Court of Claims Act, no cause of action exists against the State. (Court of Claims Act, § 8; *Fisher* v. *State of New York*, 10 N. Y. 2d 60; *Jameison* v. *State of New York*, 7 A. D. 2d 944; *Cole* v. *State of New York*, 19 Misc. 2d 589.)"

Fisher v. *State*, 10 N. Y. 2d 60 (1961), cited in *Corcoran* held the State not liable for acts of the District Attorney who was a county officer. There the Court said (p. 61):

> "Appellant's theory that an Assistant District Attorney is a State officer collides head on with section 2 of the Public Officers Law which defines 'state officer' and 'local officer'. 'State officer' in that section is defined by listing all those who are to be considered and it does not include prosecutors. Then, in the same section, the term 'local officer' is stated to include every other officer elected by the voters of a part of the State, also every officer of a political subdivision or municipal corporation (a county is a municipal corporation, County Law, § 3) and every officer limited in the execution of his official functions to a part only of the State."

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: January 20, 1970.

Respectfully submitted,

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